No. 2911

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. CHAPMAN and P. R. THOMPSON, copartners doing business under the firm name of Chapman & Thompson,

Plaintiffs in Error,

vs.

JAVA PACIFIC LINE (a corporation), STOOMVAART-MAATSCHAPPY NEDERLAND (a corporation), ROTTERDAMSCHELLOYD (a corporation), JAVA-CHINA-JAPAN LYN (a corporation), BLACK COMPANY (a corporation), and WHITE COMPANY (a corporation),

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

NATHAN H. FRANK,
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Attorneys for Defendants in Error.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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This case is founded on an undisguised attempt to make a subservient technicality defeat the ends of justice. It failed in the lower Court because the technicality did not fit the facts of the case, and for other reasons.

Before taking up the technical phase, let us consider the story of the transaction as it appears in the record.

Statement of Facts.

In December, 1915, the plaintiffs, Messrs. Chapman and Thompson, were the *traffic managers* of the Pacific Coast Steel Company. That is a function entirely apart from the brokerage business. A traffic manager attends to the contracting for space *for the firm that employs him* (Rec. p. 45).

In that capacity the plaintiffs, for and on account of the Pacific Coast Steel Company, contracted with the defendant for space for certain shipments to be made by said Pacific Coast Steel Company. These contracts are evidenced by a series of letters, beginning with the one dated December 2, 1915 (Rec. p. 79) and ending with a letter dated January 10, 1916 (Rec. pp. 79 to 100). These letters contain the terms of the contract, the party for whose account the contract is made, the ship, the route, the sailing date, the number of tons and description of cargo contracted, and the rate of freight, except that, in the last of them (which by the way are not the subject of this suit), the rate is to be fixed at the prevailing rate at the date of shipment, and in the case of the April shipment to be announced January 20th.

These shipments, provided by the above mentioned letters, were as follows:

(1) 1110 Tons Per Steamer "Arakan" to Sail February 19, 1916.

This was made up of 360 tons and 750 tons under letters of Dec. 2d, Dec. 3d, Dec. 9th and Dec. 10, 1915 (Rec. pp. 79, 81, 82, 83 and 84).

This contract was confirmed by the Pacific Coast Steel Company January 28, 1915 (Rec. p. 86).

This cargo was received on board in February and transported in accordance with the agreement.

It is the same shipment mentioned as "February shipment, 1110 weight tons", etc., in the letter from the plaintiffs to the defendant under date of January 27, 1916, and set forth in the complaint (Rec. p. 3), the same being "Plaintiff's Ex. No. 1", page 35.

(2) March Shipment 300 Tons.

This is evidenced by the letter of December 24, 1915 (Rec. p. 88), wherein there was booked for account of Pacific Coast Steel Company 400 tons of bar steel, with a request for additional space up to 1000 tons.

It is important to notice that in this letter the plaintiffs, speaking as traffic manager for the Pacific Coast Steel Company, call attention to a reason why they feel that they should have been given preference over Eastern manufacturers, saying that

> "Our steel is manufactured at San Francisco and our only opportunity of shipping is via the lines sailing from this port."

Whereas the eastern manufacturers

> "only ship from the port of San Francisco when they cannot secure space through the Atlantic Seaboard ports".

We will refer to this again.

This 400 tons was subsequently changed to 300 tons, and the change initialed by Mr. Chapman in the above letter ("I. W. C.") while the thousand additional tons were never contracted for. This change from 400 tons to 300 tons is shown by the letter of February 12, 1916 (Rec. p. 37), and the testimony of Mr. Chapman (Rec. pp. 131, 135). In the letter of January 27, 1916 (Pltffs' Ex. No. 1, p. 35) it is mentioned as 1000 tons and corrected by Plaintiff's Ex. No. 2, page 37.

After the controversy arose between these parties at the end of February, the Pacific Coast Steel Company, at the solicitation of plaintiffs, gave to the plaintiffs a letter which was delivered to the defendants by the plaintiffs, in which the Pacific Coast Steel Company denied that the contract for space was made by the plaintiffs as agents for the Pacific Coast Steel Company, or that the Pacific Coast Steel Company were principals in the matter (Rec. p. 92). Said letter was dated March 1, 1916.

Nevertheless, the Pacific Coast Steel Company, still wishing to avail itself of the contract with respect to the March shipment, wrote to the defendants on March 3d, a letter in which they say:

> "Referring to conversation during the recent visit of your Mr. Connor with regard to our letter of March 1st to Messrs. Chapman & Thompson, beg to refer you to letter dated *December 24, 1915, from J. W. Chapman to your company, booking for our account* of 400 tons of bar steel, 20 feet and under in lengths, for shipment on your steamer 'Tjsondari', scheduled to sail about March 23rd for

> Hong Kong and Manila. *Under this letter* we are entitled to ship this 400 tons in March.
>
> This material is all rolled and we would thank you to advise us date same will be accepted at the boat. Chapman & Thompson offered us space on April and May sailings, but same was declined by us. Our letter of March first to Chapman & Thompson does *not* refer to *booking per above mentioned letter of December 24th''* (Rec. pp. 90-91).

The collusion between the Pacific Coast Steel Company and the plaintiff, which gave birth to the letter of March 1st, is thus made apparent. If the Pacific Coast Steel Company is the principal in the contract for March shipment, by reason of the letter of December 24th (Ex. "F", p. 88) then why is it not the principal in the contract for the April shipment by reason of the letter of December 30th (Ex. "K", p. 96).

This 400 tons changed to 300 tons March shipment, was accordingly received from the Pacific Coast Steel Company, and shipped as agreed (Rec. p. 114).

(3) April Shipment, 1000 Tons.

On *December 24th,* the plaintiffs wrote to defendants, heading their letter as follows: "Subject: Option account Pacific Coast Steel Co.", confirming a conversation giving an option for space good until 5 p. m. December 28th for 750 tons to sail in April (Rec. 94). On *the same date,* referring to said former letter, and again under the heading: "Subject: Option Account Pacific Coast Steel Co.", they ask for an option for 250 tons additional (Rec. p. 95). And on December 30th, they write again, under the same heading, "Subject: April space on account Pacific Coast

Steel Co." "Confirming a conversation for firm booking of 1000 tons bar iron April shipment, to be at the prevailing rate for this steamer which understand will be announced about January 20th" (Rec. pp. 96-97).

Note that both options for this April shipment bear *the same date, as does the contract for March shipment claimed by the Steel Company in its letter of March 3d above referred to.*

(4) May Shipment 1000 Tons.

On December 24, 1915, the plaintiff wrote to the defendants upon "Subject: Option account Pacific Coast Steel Co.", confirming a conversation giving them an option for space good until 5 p. m. December 28th, for 1000 bar steel on steamer to sail about May 22nd, to be at the prevailing rate for this steamer, definite rate to be quoted at earliest convenience (Rec. pp. 97-98).

And on December 30, 1915, they again write, under the heading: "Subject: May option on account Pacific Coast Steel Co.", in which letter they refer to the previous letter, and mention an arrangement by which the option is extended to noon, January 3, 1916 (Rec. p. 99).

On January 10, 1916, the plaintiffs write to the defendants, by which letter they confirm firm booking for 1000 tons bar steel "for account Pacific Coast Steel Co." per steamer scheduled to sail about May 22nd, freight rate at prevailing rate for this steamer, which they understand will be announced in February (Rec. p. 100).

With matters in this condition plaintiffs requested defendants to hand in a memorandum of the reservations so made by plaintiffs as aforesaid, which request was complied with in the letter of January 22nd (Rec. pp. 115-116). Immediately following the receipt of this memorandum, the plaintiffs write the letter of January 27, 1916 (set out in the complaint pp. 3 and 4; Pltffs' Ex. No. 1, p. 35), in which they ask for confirmation of "the rates which are to apply". This was followed on February 12th by the letter of defendants set forth in the complaint (Rec. p. 4, Pltffs' Ex. No. 2, p. 37).

Previous to this latter correspondence, it appears that Mr. Chapman had some conversations with Mr. Edwards, the *stenographer* for Mr. Connor, traffic manager of the defendant; that *on the 15th day of January* he called at the office of defendant, at which time Mr. Chapman relates the following:

> "I asked Mr. Edwards if he had been able to increase booking space for *March* shipment. He said 'No, but I have you down on the waiting list, and if there is a possible chance we will give you more space *for March'*. I said to Mr. Edwards, *'You understand that all these bookings are for Chapman & Thompson'*.
>
> Mr. HARWOOD. Q. What did he say?
>
> A. He replied, 'Yes', and showed me the book"
>
> (Rec. pp. 119-20).

In this connection it will be remembered that the March shipment was claimed by the Pacific Coast Steel Company, in its letter of March 3d, Defts' Ex. "G", p. 90), as belonging to it by right of the contract of De-

cember 24, 1915 (Defts' Ex. "F", p. 88) and shipment was made in accordance therewith by the Pacific Coast Steel Company. Nevertheless, Mr. Chapman claims, in the foregoing conversation to have inquired only of the *March* shipment, and to have added, "You understand", etc., though it is admitted that the March booking was for Pacific Coast Steel Company.

Again, referring to a conversation which is supposed to have been on January 21st, he says:

> "A. Mr. Edwards called at the office of Chapman & Thompson in the Fife Building. I requested him to furnish me a list of confirmation of all of the bookings and reservations for Chapman & Thompson for the various months.
>
> Q. What else did you say, if anything?
>
> A. At the same time I stated to Mr. Edwards again, 'You understand these bookings are all for Chapman & Thompson'.
>
> The COURT. How did you come to make a statement of that kind with nothing said on the other side—you had had a lot of dealings with him, hadn't you?
>
> A. Yes, but *prior to that it was expected that the Pacific Coast Steel Co. would use all,* or a good part of that space. *Just prior to the 15th of January they advised us that they would not want it all.*
>
> Q. Did you ever advise the defendant of that fact?
>
> A. *No, I did not"* (Rec. pp. 120-121).

Subsequently the witness is asked:

> "Q. Mr. Chapman, on those two occasions when you say you told Mr. Edwards that these bookings were for account of Chapman & Thompson, why didn't you inform him that the Pacific Coast Steel Company didn't want the space?

A. I didn't consider it necessary.

Q. Now, you are aware of the fact that so far as your negotiations had then proceeded with these parties in writing, that this space had been engaged for account of Pacific Coast Steel Company are you?

A. As shown by those letters?

Q. Shown by the letters; and that they were treating it so, as shown by their answers; is that not so?

A. I don't recall in their answers.

The COURT. You know that they were regarding it as space for the Steel Company, did you not?

A. From our letters they would take it as that, yes.

Mr. FRANK. Q. And this is the first time, according to your present contention, that you ever sought or intimated to them either directly or indirectly, that you were the parties, and the Pacific Coast Steel Company was not, is not that the case?

A. Yes.

Q. Why, then, when you were trying to disabuse them, as you suggest now, of the idea that they were contracting with the Pacific Coast Steel Company, didn't you tell them that the Pacific Coast Steel Company would not take it?

A. For the reason that at that time it *was not definite* that the Pacific Coast Steel Company would not use any of this space; we expected that they would use part of it'' (Rec. pp. 124-25).

The witness then attempts to further justify himself, upon the ground that Mr. Connor had requested to have the shipper confirm the bookings, and testifies that that is the reason the letter of January 28th from the Pacific Coast Steel Company was sent to the defendants (Rec. pp. 126-27). The letter of January 28th is found in the Record at page 86.

He is then asked about the booking for March, which was not confirmed by the Pacific Coast Steel Company until March 3rd (Letter, Rec. p. 90), when the following occurred (Rec. p. 127):

"Q. How about the next bookings for March, how does it happen that the Pacific Coast Steel Company claimed them under the letter of December 28th, 1915? [Error, should be December 24th.]

* * * * * * *

A. That was after the contract with us had been repudiated, and we had advised the Pacific Coast Steel Company that Mr. Connor would no longer deal with us, but wanted to deal with the Steel Company direct, and the correspondence that took place between the Java Pacific Line and the Pacific Coast Steel Company in late February and March I am not familiar with.

Q. How were they advised of the letter of December 24, 1915, and how did they know that there was a letter *making a contract for them, and not a contract for you?*

A. *I advised them of the letter.*

Q. You advised them of that?

A. Yes.

* * * * * *

I may have given them a copy of the letter; I am not sure of it.

Q. At that time, up to March 3, 1916, there had been no confirmation from the Pacific Coast Steel Company to the Java Pacific Line of that particular shipment as there had been of the February shipment which I have just referred to, had there?

A. Not to my knowledge.

Q. Then that of March stood exactly in the same place, in the same situation as the April shipment stands today, did it not at that time?

(Interrupted by objection.)

> Mr. Frank. Q. So far as confirmation is concerned, and so far as any advice from you to the Java Pacific Line is concerned, that it was for the Pacific Coast Steel Company and not for you, I mean.
>
> A. Upon what date was that?
>
> Q. Up to March; it [at] all dates from December 24th, 1915, up to and including March 3d, 1916."

The witness here attempts to interject the letter of January 27th and its confirmation, as an answer, and is finally brought down to the issue, and replies:

> "A. In reference to the March shipment, I am not familiar with any correspondence between the Pacific Coast Steel Company and the Java Pacific line after the contract of January 27th was repudiated, which was on, I believe, about February 26th."

Nevertheless, the witness is brought down to the fact that the confirmation of the March shipment (which is a confirmation of the contract under the letter of December 24th), was not a change in the contract as then existing, but a claim on the part of the Pacific Coast Steel Company that they were entitled to the benefit of the contract evidenced by the letter of December 24th, and Mr. Chapman admits that he had advised them that he had reserved that space for them. "I may have given them a copy of the letter; I am not sure of it" (Rec. p. 128). Note that this March shipment is one of the shipments claimed by Chapman & Thompson to have been made with them as principals, under the terms of the letter of January 27th, and its confirmation and not with the Pacific Coast Steel Company.

Now, let us refer to the letter of January 27th (Rec. p. 3) upon which the complaint is based, and to the allegations of the complaint regarding damages.

We have the following items in the letter of January 27th:

The February shipment of 1110 tons, evidenced by the correspondence, Defendant's Exhibits "A", "B", "C", "D" and "F" (Rec. pp. 79, 81, 82, 83, 84 and 86), being "for account of the Pacific Coast Steel Co." This was shipped by the Pacific Coast Steel Company.

The March shipment of 300 tons, claimed by the Pacific Coast Steel Company under the letter of December 24th (Ex. "F", Rec. p. 88), which was a booking and request for option for space "for account of the Pacific Coast Steel Co."

The April shipment of 1000 tons, evidenced by the *two* letters of *December 24th* (Ex. "I" and "J", pp. 94-95) and the letter of December 30th (Defts' Ex. "K", Rec. p. 96), which was a booking for "April space on account of Pacific Coast Steel Company."

The May and June shipments are not in controversy (Pltffs' Br. p. 29).

Really the only shipment concerning which, under the pleadings and testimony there can be any controversy, is the *April* shipment.

The allegations of the complaint setting up the damages are:

Art. IX, page 8—$12,000 for the alleged breach of contract with respect to the said March shipment of 300 tons.

Art. X, page 9.—$1650 damages for the alleged breach in failure to carry 66 tons destined for April shipment.

Art. XI.—$23,350 for the alleged breach of the carriage of the balance of the April shipment of 1000 tons, namely, 934 tons.

This whole claim of damages is restated in Art. XII (pp. 10 and 11), namely, for the failure to carry the March shipment of 300 tons, and the April shipment of 1000 tons.

No claim is made for any breach with respect to the May or June shipments.

Now, we have already seen that the *March* shipment was performed, and so the controversy in the case narrows itself down to the question whether or no the contract for the *April* shipment was for account of the plaintiffs or for the account of Pacific Coast Steel Company.

Let us now proceed with another phase of the story.

It was shown at the beginning of this statement, that the plaintiffs were acting as the traffic managers of the Pacific Coast Steel Company, in which capacity it was their duty to, and they did, make the reservations for the Pacific Coast Steel Company. Not only this, but they themselves *never had any steel or other cargo for shipment.*

> "The COURT. Q. Well, you were not shippers at any time, were you?
> A. No, sir.
> Q. You merely acted as a manager for the purpose of securing space?
> A. Yes, or as a broker" (Rec. pp. 56-57).

Again:

> "The COURT. Q. As a matter of fact, Mr. Chapman, you personally had no freight at all to ship? A. Chapman and Thompson had no freight themselves to ship" (Rec. p. 122).

It appears further that Mr. C. L. Dimon, of New York, had bought the steamer "Justin" for the carriage of a cargo of export leaf tobacco, and that he required some heavy cargo to fill the extra space; that he "was in the market for 1500 tons of iron and steel and other heavy commodities"; that he applied to Mr. Chapman, who advised him that in the latter's opinion Mr. Dimon could secure iron and steel for Shanghai and other Oriental ports at a rate of at least $40 per ton, and that he would have no trouble. But the plaintiff did not try to secure the space thus offered to him so as to save the loss he claims against us for our refusal to give him space for 1000 tons April shipment. He did not ask Mr. Dimon for that space nor what rate he would charge; he never attempted to bargain with Mr. Dimon at all to carry his iron and steel (Rec. pp. 54-55-56). The opportunity to save the loss was thus brought to his very door, and he failed to avail himself of it.

It also appears that some time subsequent to the writing of the letter of January 27th, Mr. Chapman met Mr. Connor, traffic manager for the Java Pacific Company on the floor of the Merchants Exchange, when Mr. Connor approached him and said:

> "I understand you are trying to sell space under the bookings on our vessels",

and Mr. Chapman is asked:

"Q. What did you reply to it?

A. I replied that *we were not*" (Rec. p. 122).

* * * * * *

"Q. What reply did he make when you said you were not trying to sell it?

A. He replied that he had been informed that space had been offered at rates higher than his published tariff.

Q. Is that all—by Chapman and Thompson?

A. No, he didn't say by Chapman and Thompson.

Q. What did you understand to be the purpose of that suggestion?

A. That he was seeking information as to whether or not space had been offered.

Q. He was seeking information from you?

A. Yes.

Q. You told him you were not selling?

A. Yes" (p. 123).

* * * * * *

"Q. This was all, after you had denied trying to sell any?

A. After I had stated to him that I had not sold any.

Q. Did he ask you if you were soliciting?

A. No.

Q. Did you state that you were not soliciting?

A. No.

The Court. Q. He asked you if you were not trying to sell space, didn't he?

A. Yes.

Q. Trying to sell space is soliciting patrons to occupy space isn't it, you say you didn't solicit patronage for the space.

A. At that time we had not; we had made no bookings.

Q. Offering to sell space is soliciting—is equivalent to soliciting people to take it, isn't it?

A. In a general way, yes.

The Court. That is what I thought" (p. 124).

Though Mr. Connor's account of this conversation differs somewhat from that of Mr. Chapman, we refer to it here, not for the purpose of suggesting any conflict in testimony (for in the present position of the case we are compelled to accept Mr. Chapman's statement as true, that is, as true for the purposes of the instructed verdict for the defendant), nevertheless, we repeat Mr. Connor's account for its illuminating effect.

After saying that the conversation was either the day before or the day after Washington's Birthday, he proceeds (p. 142):

> "I met Mr. Chapman and said 'Good morning, Chapman, I understand you are offering freight space on our steamers for sale; is that so'? He said, 'Why, no.' I said, 'Haven't sold any'? He said, 'No.' I said, 'That is funny, I heard it yesterday afternoon and again this morning on the street.' 'It is not so.' I said, 'You understand, Chapman, you cannot sell any space on our steamers; you have not any space on our steamers for sale; all the space we have got has been booked through you for the Pacific Coast Steel Company, and for certain items, commodities; it is good for nothing else'.
>
> Q. What did he reply?
>
> A. He said, 'I understand that'."

The purpose of bringing to the attention of the Court this particular fact, is to illustrate the manner of Mr. Chapman's dealings. As shown by his own testimony, he was entirely disingenious when asked whether or not he was trying to sell space under the bookings on the vessel. If he thought he had a right to sell it by virtue of his letter of January 27th, there is no reason why he should dodge the issue. Consider this attitude

in connection with his disingeniousness with respect to the notification which he claims he gave through Mr. Edwards, Connor's stenographer, on January 15th, on which date he says the Pacific Coast Steel people advised him that they would not want all of the space; also the like disingeniousness with respect to the alleged conversation with said stenographer at his office in the Fife Building, and his reply when asked why he didn't give them direct notice of said withdrawal of the Pacific Coast Steel Company; also the hidden manner in which he sought to frame a new contract in a letter of January 27th so as to encompass his purpose. These are the bases of the statement contained in defendant's Exhibit "O", letter of February 29th (Rec. pp. 103-104) that

> "Your claim that the contract for space is for your account is not well founded, and your attempt to sell the same is a fraud upon us."

All these facts indicate a palpable preconceived fraud, or attempt at fraud upon the defendant, and the only question before this Court is, whether or no, by the aid of a technical rule of law, he will be able to make that fraud good. Plaintiff had secret knowledge of the fact that the Steel Company, for whom the space was contracted, would probably not want it, and so attempted to appropriate it to himself for the profit he thought he saw. He did not advise defendants of the fact and ask them to accept him as principal, but attempted to commit them by indirection—to trap them into it.

NOW, WHAT IS THE RULE OF LAW TO GOVERN IN THIS CASE?

1. The plaintiff is estopped by the pleadings.—It is to be observed that while the plaintiffs claim the letter of January 27th and February 12th to be the contract, they introduce into that part of the complaint by which it is intended to set forth the contract of the parties, namely Art. IV, page 2, the following allegation:

> That *prior to the 27th day of January,* 1916, plaintiffs requested defendants *to reserve for plaintiffs* space in the steamers of defendants sailing from San Francisco to Hong Kong and Manila during the months of February, March, April, May and June, 1916. That on the 27th day of January, 1916, plaintiff wrote and delivered to defendants a letter in the words and figures following", etc.

Here is a direct allegation, that prior to the 27th day of January, 1916, plaintiffs requested defendants to reserve *for the plaintiffs* such space.

This allegation is directly met and put in issue by the following denial in the answer, Art. I, page 19:

> "Answering unto article IV in said complaint, these defendants deny that prior to the 27th day of January, 1916, or at any other time, or at all, plaintiffs requested defendant to reserve for plaintiffs space in the steamers of defendant sailing from San Francisco to Hong Kong and Manila during the months of February, March, April, May and June, or to reserve for said plaintiffs space on any steamers whatsoever, or for any sailings whatsoever.
>
> On the contrary, the said defendants allege",

and then is set forth the facts covering said prior requests, showing that each and every one of them was

made of defendants to reserve for the *Pacific Coast Steel Company* space on the steamers mentioned (Rec. pp. 19, 20, 21, 22).

Here we have the plaintiff himself, in his pleading, offering as part and parcel of the transaction upon which their right is based, the previous requests for space, and in the same connection raising the direct issue whether or not those previous requests were to reserve space for *plaintiffs,* or for some one else, and the direct issue made by the defendants, that they were not requested to reserve for plaintiffs, but were requested to reserve such space for the Pacific Coast Steel Company.

By this very state of the pleadings, is not the previous correspondence tendered by the plaintiffs as part and parcel of the contract, and accepted by defendants as part and parcel of the contract? And under this state of pleadings how can plaintiff be heard to ask:

(a) That the answer, which responds directly to the issue thus tendered, shall be stricken out as surplusage, as was done in effect by the demurrer to the complaint; or,

(b) That upon the trial the issue thus tendered and accepted shall not be proved by the letters and correspondence which are the evidence upon such issue?

It seems to us puerile for the plaintiffs to argue that the rule of evidence for which they contend, be it ever so sacred, has any application to a case founded upon such issues.

The whole question presented by the pleadings is whether or not the space requested by plaintiffs prior to the 27th day of January to be reserved, was by them requested to be reserved for themselves, or for the Pacific Coast Steel Company. In both cases by the pleading the letter of January 27th is admitted to be based upon those previous requests for space, and to incorporate those previous requests within itself, and the issue tendered is, were those previous requests for one party, or for the other?

We think this is a conclusive reply to the long and somewhat involved argument in plaintiff's brief, wherein plaintiff attempts by a display of close logic founded, as we think, upon false premises, to prove that it was improper for the Court to admit that correspondence in evidence, and after having been admitted in evidence, that it was improper for the Court to instruct the jury in effect that the contract, as construed by the Court, was a contract between the Pacific Coast Steel Company and the defendant, and not a contract between Chapman and Thompson and the defendant.

2. The parties themselves construed the contract as we construe it.—We have already called attention to the fact that the *February* and *March* shipments were confirmed and *claimed* by the Pacific Coast Steel Company as *their* contract entered into with them *by virtue of these antecedent letters,* and not by virtue of the letter of January 27th, and in this claim the plaintiffs acceded. There was no transfer or assignment to the Pacific Coast Steel Company. In the February ship-

ment they confirmed the act of Chapman & Thompson, as evidenced by the letters—Exhibits "A", "B", "C", "D", "E" (pp. 79-86), dated December 2d, 3d, 9th, 10th and January 28th. In the March shipment they claimed it directly as founded upon the letter Exhibit "F", dated December 24th (p. 88) and Mr. Chapman testifies that he notified them of said letter, or may have given them a copy of said letter. These contracts were recognized, honored and executed by the defendant with the Pacific Coast Steel Company.

Thus have all of the parties placed a construction upon their contract. Nevertheless, the February shipment and the March shipment are included in the letter of January 27th, and if the February shipment and the March shipment thus included in the letter of January 27th, are as hereinbefore shown, recognized as contracts between the defendant and the Pacific Coast Steel Company, how can the same letter containing a provision respecting the April shipment be subject to a different rule, or a different interpretation?

3. There is no evidence of oral negotiations unconfirmed by said letters.—Plaintiff seems to base his entire contention in this case upon a claim that the prior negotiations and transactions were partly by correspondence and partly *oral.* Without admitting the effect of such a condition for which he contends, it is sufficient reply to point out that in such statement he is entirely in error. There is no evidence of any such *oral* negotiations, except such oral negotiations *as are confirmed by the letters here in dispute. Without exception the letters are either by direct reference a con-*

firmation of the previous oral negotiations into which such oral negotiations are merged, or a reply to a previous letter.

If this statement of ours be found to be true, then according to plaintiff's own admission, there is nothing left for the application of the rule excluding parole evidence to vary the terms of a written contract.

Let us quote from their brief, page 49:

> "The learned judge of the trial court took the view that the contract between the plaintiffs and the defendants was a 'contract by correspondence', and that all the letters constituting the correspondence between the parties were a part of the contract.
>
> *Now we do not dispute the proposition that in a case where all the communications between the parties have been by correspondence all of the correspondence may be admissible in evidence.* We seriously doubt, however, that even in such a case the legal effect of the contract formed by the two final letters can be changed by the prior correspondence.
>
> But we do most earnestly maintain that where the prior negotiations and transactions have been partly by correspondence and partly oral, the prior correspondence cannot be permitted to change the terms or the legal effect of the agreement evidenced by the final letters, which on their face make a complete agreement."
>
> * * * * * *
>
> "This is not a case where the negotiations leading up to the final contract and the final contract itself consist entirely of correspondence. The letters introduced in evidence by the defendants *themselves show the existence of oral negotiations and transactions.*"
>
> * * * * * *
>
> "In addition to the letters introduced in evidence by the defendants there were many oral

communications, the existence of which *is shown by the letters* which defendants have introduced in evidence.

If there had been no oral negotiations and the communications and transactions preceding the letters of January 27th and February 12th had been entirely by correspondence *it might be said that all letters form part of the same contract and that nothing to the contrary appearing therein it would be presumed that the space reserved was for account of the Steel Company.*''

It seems to us that the foregoing is a complete admission of the case made by the defendants, when we regard the fact that in each instance where ''the letters introduced in evidence by the defendants themselves show the existence of oral negotiations and transactions'' such oral negotiations and transactions are only shown therein because the letters themselves were confirmations of said oral negotiations.

Take the letter of December 2nd, Ex. ''A'' (Rec. p. 79). It begins:

''Referring to interview with Mr. Chapman on November 27th:''

''We understand that you have booked firm 360 tons steel'', etc.

''Also, that we gave you option to ship an aggregate of 750 tons'', etc.

''In order that we may be sure there is no misunderstanding, will you kindly confirm'', etc.

The reply, December 3rd, Ex. ''B'' (Rec. p. 81):

''In re your letter Dec. 2nd.''

''We have booked firm'', etc.

''You have also given us option for 750 tons'', etc.

Letter of December 9th, Ex. "C" (p. 82):

"Referring to our letter of Dec. 3rd, also telephone conversation, we desire to book firm the 750 tons of space for steel bars on which you have given us an option."

"Will you please acknowledge receipt."

Letter of December 10th, Ex. "D" (p. 84):

"Replying to your letter of December 9th, I note that you book firm 750 tons steel bars", etc.

"All of which we confirm."

Letter of January 28th, Ex. "E" (p. 86), Pacific Coast Steel Company to J. D. Spreckels:

"This will confirm firm booking for 1110 tons", etc.

"This in in accordance with the booking made by Chapman and Thompson."

Letter of December 24, Ex. "F" (p. 88):

"This will confirm conversation with your Mr. Edwards wherein we have booked firm", etc.

"In line with our conversation, we desire all of the additional space", etc.

Letter of December 24th, Ex. "I" (p. 94):

"This will confirm conversation with your Mr. Edwards wherein you have given us option for space", etc.

"Please acknowledge receipt."

Letter of December 24th, Ex. "J" (p. 95):

"Referring to our letter of today covering option", etc.

"We would like to have option for 250 tons additional", etc.

"Will you please advise if you can grant us this additional option."

Letter of December 30th, Ex. "K" (p. 96):

"This will confirm conversation with your Mr. Edwards, where we have booked firm space for 1000 tons", etc.

Letter of December 24th, Ex. "L" (p. 97):

"This will confirm conversation with your Mr. Edwards wherein you have given us option for space", etc.

Letter of December 30th, Ex. "M" (p. 99):

"Referring to our letter of December 24th regarding option", etc.

"In accordance with an arrangement with your Mr. Edwards this option has been extended", etc.

"Please confirm."

Letter of January 10th, Ex. "N" (p. 100):

"This will confirm conversation with your Mr. Edwards wherein we have made firm booking for space for 1000 tons", etc.

"Please acknowledge receipt."

Letter of January 22nd, Ex. "4" (p. 115):

"Confirming conversation with your Mr. Chapman on January 21st", etc.

We do not overlook the statements contained on pages 73, 74 and 75 of plaintiffs' brief concerning oral testimony, but this was not testimony offered by defendants. It was offered by plaintiffs, and in offering said testimony at the trial they admit that they "accepted * * * the defendant's theory of the case and offered oral testimony", etc. (Brief p. 73). It is immaterial that they claim to have done so "under constraint", though there was, in fact, no constraint. If they had not de-

sired to do so, they should have stood upon their case as originally made. *By accepting the defendants' theory of the case, and introducing evidence under such theory, they thereby, at the trial, waived objections to such evidence.* A party cannot be permitted at the trial to avail himself of a position from which, in the course of the trial, he recedes for the purpose of securing an advantage by thus receding. He is bound to rest upon his objection.

Neither is the testimony to which the plaintiff refers effective for the purpose for which he offered it. The conversation with Mr. Edwards on January 15th and January 21st has been fully treated in the earlier part of this brief. They were not conversations with any one who had authority to bind the defendants, but were with the stenographer in Mr. Connor's office, and the fact that every previous conversation with Mr. Edwards was specifically confirmed by letter, over the signature of the responsible agent of the defendants, shows that Mr. Edwards himself had no power to contract.

The rest of the conversations are with Mr. Connor, the first of which was a request for a letter from the Pacific Coast Steel Company confirming the bookings. This conversation was followed by a letter, and makes no change in the contract, but on the contrary confirms the contract.

The next conversation is a conversation of precisely the same nature, which purports no change whatsoever in the terms of the contract.

The next conversation referred to is the one had *long after the entire correspondence, and the contract itself had been finally concluded.* Mr. Chapman fixes it at February 10th; Mr. Connor fixes it at February 21st or 23rd. It is the conversation in which, according to Mr. Chapman, Mr. Connor said "I understand you are trying to sell space under bookings on our vessels", to which Mr. Chapman replied that he was not (Rec. p. 122), and in which Mr. Connor says that he directly told him that he had no right to do so.

The part interjected by Mr. Chapman into that conversation to which reference is made in the brief, namely:

> "We also discussed the volume of dead weight cargo that *had been* booked, and Mr. Connor explained to me that he would much prefer if he could take some measurement cargo or light bulk, as the iron and steel that we had on his steamers took so much longer to load than the light and bulky freight" (pp. 123-24),

was *not only long after* the letter of January 27th had been written, but it also, on its face, *does not purport to be an attempt to negotiate any terms of that contract,* but is simply the expression, on the part of Mr. Connor, of a preference, which preference he was not seeking to and did not impose upon the plaintiffs.

So we repeat with confidence, that there is not a particle of oral testimony in the record intended to change the terms of the contract except such as is confirmed and therefore merged in the said letters.

In view of the foregoing, no further comment seems necessary upon the attempt of plaintiff to explain away

the case of *Georgia R. R. & Banking Co. v. Smith,* 10 S. E. Rep. 235 (Plffs. Br. pp. 66 to 70). After quoting part of the decision, counsel says:

> "Argument is unnecessary to show that this decision is not authority in support of the defendants' contention in the case at bar. The case is not authority here for the following reasons:
>
> 1. In the case cited all of the communications between the parties were by letter or telegram—there were no oral communications. In the case at bar there were many oral communications between the parties in addition to the letters which the defendants introduced in evidence.
>
> 2. The last telegram from the Georgia road to the state road did not purport to state the terms of the proposed agreement with the consignee. It merely authorized the state road to close the contract referred to in the previous telegrams. In the case at bar the two letters of January 27th and February 12th constitute a complete contract between the parties."

On our part we think that "argument is unnecessary" to show that this decision *is* authority in support of our position.

So far as proposition No. 1 is concerned, it is completely answered by what precedes this. So far as No. 2 is concerned, it begs the entire question. The real purport and meaning of that decision is found in the syllabus, as follows:

> "2. If the Terms of a Contract Between Two Railways Be Agreed Upon by Correspondence, a Limitation or Condition Inserted in One or More of the Communications Need Not be Repeated or Referred to in Subsequent Ones, in Order to Preserve Its Force." (Syl.)

It seems unnecessary to requote the language of the Court, as it is correctly set forth on pages 68 and 69, of plaintiff's brief, but for the sake of convenience we append it as follows, preceded by our view of the case presented:

A contract had been entered into by correspondence, and the question under consideration was whether or not the contract contained a limit with respect to the time of the performance of the contract to the summer months, or to the summer and autumn months of the year in which it is made.

A dispatch was sent at the time of closing the contract which was silent on the element of time (p. 236).

The Court was asked to charge the jury:

> "If the contract be alleged to have occurred by letter or telegram, and if, in any or either of the communications on the subject, the limitation or condition was inserted it would not be necessary to repeat or again refer to such condition or limitation in every subsequent letter between the parties in order to preserve its force. If the alleged condition or limitation existed, and was so understood between the parties in point of fact, it should be regarded and enforced as part of the contract, whether again repeated or alluded to in other or subsequent letters or telegrams or not."

A *refusal* to give this instruction was *held to be error,* and the Court said:

> "Several telegrams and one or more letters touching the contract in question were sent by the superintendent of the Georgia railroad which were silent as to any time element. One of these was the telegram above referred to, giving authority and instructions to close the contract. The silence

of all these documents upon the element of time is strongly suggestive of the theory that in the contemplation of the writers time was not of the essence of the agreement between the two roads; *yet it is true, as the request to charge lays it down, that, if in any or either of the communications on the subject a limitation or condition was inserted, it would not be necessary to repeat or again refer to such limitation or condition* in every subsequent letter between the parties, *in order to preserve its force.* Thus, if in the lost telegrams, or any of them, from the state road to the Georgia road, the condition or limitation was inserted, and in point of fact the authorities of the two roads understood the limitation or condition as forming a part of the contemplated contract, the silence of any or all the subsequent communications on the subject would not displace or defeat the time element; in other words, the silence of the subsequent communications could be regarded by the jury as tending to show what sort of a contract the Georgia road authorized the state road to make in its behalf; but the jury could not rightfully treat such silence as defeating the condition or limitation, which, by an agreement of the two roads, was to be part of the terms of the contract that one of these authorized the other to make with the consignee."

A somewhat similar case is that of

Beach v. Raratan & Delaware Bay R. R. Co., 37 N. Y. 457,

the syllabus of which is in the following language:

"Where There Has Been a Previous Oral Communication Between the Parties, In Respect to the Subject Matter of a Contract, and a Telegram Is Sent to Fix Some Details of the Agreement, Such Telegram Is Evidence Only to the Point, and Does Not Constitute the Contract." (Syl. p. 457.)

In that case the question of the terms of the contract for the letting of a barge was under consideration.

Plaintiff claimed that the letting of the barge to Mellen was for a special and restricted use, viz: employment as a receiving or store barge in his slip, or for such general use as was suitable for a barge. This was disputed by Mellen.

> "Evidence was given of oral negotiations with the plaintiffs at Catskill, where they resided, out of which the plaintiffs claim that the restrictions upon the use of the barge arose. The plaintiffs' final assent to the letting was communicated to Mellen at New York by telegram."

The telegram was as follows:

> "You may have barge Globe for $400 until Oct. 1. Rent payable ½ 1st July and ½ 1st Oct.
>
> PENFIELD, DAY & Co.
>
> March 19th, 1860."

Without further negotiations Mellen took possession of the barge.

Mellen let the barge to the railway company to transport railroad iron from the port of New York to the port of New Jersey, in which service she sank.

> "The defendants, by objection to evidence, and by request for instructions to the jury, insisted that the telegram sent by the plaintiffs, at Catskill, on Monday, the 19th of March, 1860, to Mellen (the lessee of the barge), in New York, is to be taken as the only legal evidence of the contract for the barge made with the plaintiffs; and that therefore all proof of the oral negotiations or agreement made by Mellen with the plaintiffs, at Catskill, on the Saturday previous (March 17) was inadmissible and should be disregarded."

This claim was on the theory that where the contract of the parties is reduced to writing, all prior and contemporaneous oral negotiations or agreements are merged, and oral testimony is not admissible to alter, contract, enlarge, or if free from ambiguity, explain it.

Held that the evidence was admissible as indicated by the syllabus.

4. Completed contract question of intention.—It must be conceded that the question whether or not the final letters constituted a complete contract, to the exclusion of the previous letters, is a question of the intention of the parties.

In arriving at that intention, the foregoing considerations, namely, the construction placed upon the contract by the parties in the manner of its ~~execution~~ performance; the fact that it is conceded that the February and March shipments included in the letter of January 27th are, by virtue of the previous correspondence contracted for the account of the Pacific Coast Steel Company, makes it conclusive that the April shipment was intended to be subject to the same conditions. There can not be two interpretations for the same instrument.

However, there is further and internal evidence in said letter of January 27th that it was not intended to be the final contract between the parties, but was only intended as a memorandum. It contains a provision for an additional shipment, namely, May 1,000 tons, *concerning which there is no detail in said letter of January 27th.* By necessary inference it refers to previous correspondence. In the case of the May shipment, that

previous correspondence is shown in the record (Defendant's Ex. "N", p. 100), which is as follows:

> "This will confirm conversation with your Mr. Edwards wherein we have made firm booking for space for 1,000 tons of bar steel 20 feet and under in length for account of Pacific Coast Steel Company for shipment from San Francisco to Hong Kong or Manila on your steamer the 'Tjikebang', or substitute, scheduled to sail about May 22nd.
>
> Freight rate to be at the prevailing rate for this steamer which we understand will be announced by you in February.
>
> Please acknowledge receipt."

The reference to this letter is made in the letter of January 27th as follows:

> "May shipment 1,000 weight tons, rate to Hong Kong and Manila to be quoted about February 20th."

Now, if said letter of January 27th requires the previous correspondence for its detail in order that it may be completed with respect to the May shipment, it certainly cannot be treated, even upon its face, as the final and exclusive expression of the intention of the parties with respect to said shipment. Take this in connection with what we have suggested respecting the admission regarding the February and March shipments, and the position is conclusive.

5. The decisions.—In view of the foregoing, it seems entirely unnecessary to comment upon the decisions offered by the plaintiff. As already suggested, *they do not fit the facts.* To quote a few words from *Union Selling Co. v. Jones,* 128 Fed. 674-75, a case much relied

upon by the plaintiffs, and which quotations in themselves are sufficient to point a distinction between that case and the case at bar, we have the following:

Speaking of the contract there under consideration, the Court said that it

> "does not suggest that either of these was in the minds of the parties when they reduced their agreement to writing or that the whole agreement is not completely expressed therein".

The quotation in that case from the Minnesota case states the law as requiring that the written contract must import "on its face to be a complete expression of the whole agreement". As seen above, these letters do *not* import upon their face, to be a complete expression of the whole agreement.

We further call attention to the following language:

> "Where *without fraud,* accident or mistake, the written contract purports to be a monument of the transaction, it supercedes all prior representations, proposals and negotiations", etc.

It seems that nothing further is necessary to be said upon this subject.

6. Question one for the court.—There seems to be no question between us that the proposition now under discussion was a question for the Court, and not for the jury. As said in the plaintiff's brief, p. 66:

> "It is for the court to determine whether correspondence between the parties amounts to a contract: Wristen v. Bowles, 82 Cal. 84; Luckhardt v. Ogden, 30 Cal. 547."

With this we are agreed.

7. No damages proved.—Assuming that we are wrong in our foregoing contentions, the instruction of the Court to bring in a verdict for the defendants was still proper, because,

(a) *There were no damages proved such as are recoverable under a breach of contract of this kind.*

The most that can be claimed by the plaintiffs is a contract "for shipment" on board of defendant's vessels of certain specified merchandise, at certain times, by certain steamers, and at certain rates. That is the language of the letter of January 27th itself:

"Confirming bookings for shipment."

Now, the evidence is conclusive that at no time did he have any goods for shipment—the only contract which he claims to have had was one of the Shell Oil Co. for 71 tons (Rec. p. 64), and this was for *May* shipment, which is not here in controversy. The shipper had expected it to be an April shipment, but it was held over *by the suppliers* (Rec. p. 64). It therefore could *not* have been sent in April, and was finally booked for May shipment (Rec. p. 65).

There is no evidence of any other cargo being contracted for, and no allegation in the complaint regarding any other contracts. The allegation of Art. X, that he contracted with the Shell Oil Company to sell 66 tons space for April shipment, is, as shown by the foregoing testimony, not true.

We are discussing this proposition upon the assumption that he would have had a right to sell, but it is our contention that that is not the rule of damages.

The rule of damages is the difference between what we contracted to carry it for, and what he was compelled to pay another ship to carry the same cargo, and as he never had any other cargo to send forward, and as he never attempted to send any other cargo forward, he has suffered no damages.

(b) *He made no attempt to send it forward by April shipment when he had the opportunity.*

Had he had any cargo to send forward, the April shipment being the only one concerning which a breach is claimed in the complaint, he had ample opportunity to contract with Mr. Dimond to forward it on the "Justin" in April, which he did not attempt to do, and whereby he might have saved all the damages in this matter. He is, also, on *that* account not entitled to recover, it being the rule that it is incumbent upon him to protect himself from loss when it can be done by reasonable exertion and expense, and his failure to do so when opportunity presents itself, deprives him of the right of recovery. The facts applicable to this proposition are set forth on p. 14, ante.

We think, in the foregoing, we have sufficiently developed our case, so that the position we take may be fully appreciated by the Court, though upon these latter points we should have been pleased to have gone into some further detail. We should further have been pleased to criticise the authorities presented by the plaintiffs, as well as present some further authorities upon our own behalf, but the time for such purpose is not available.

We respectfully submit that the judgment of the lower Court should be affirmed.

Dated, San Francisco,
March 17, 1917.

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